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No. 07-1035

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RENE SAWANIE MERSWIN

Petitioner,

v.

THE WILLIAMS COMPANIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

J. PATRICK CREMIN
Counsel of Record
MOLLY BIRCHER
HALL, ESTILL
320 South Boston Avenue
Suite 200
Tulsa, Oklahoma 74103
(918) 594-0400

Attorneys for Respondent

214576

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Petitioner has presented any compelling reasons to grant the Petition for Writ of *Certiorari*, or whether the Petition for Writ of *Certiorari* should be denied because the Petitioner has only presented his assertion that the Tenth Circuit and the District Court misapplied *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006), to his version of the facts in this case.

CORPORATE DISCLOSURE STATEMENT

Respondent, The Williams Companies, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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U.S. Sup. Ct. R. 10 7

INTRODUCTION

This is a race and national origin discrimination and retaliation case, in which Petitioner, appearing *pro se*, alleges that Respondent limited his promotional employment opportunities on the basis of his race and national origin and retaliated against him as a result of his formal and informal complaints of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). More specifically, Petitioner asserts that he was discriminated against on the basis of his race and national origin because he was asked to cross-train on different Information Technology applications and systems and taken off *Remedy* – his preferred application – shortly before Respondent outsourced its Information Technology Department to IBM. He further claims that he was retaliated against for filing an administrative Charge of Discrimination based upon this alleged discrimination. The District Court granted summary judgment for Respondent on Petitioner's claims, and the Tenth Circuit affirmed the District Court's granting of summary judgment.

Petitioner, as he has throughout this action, argues that neither the Tenth Circuit nor the District Court appropriately applied *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006) ("*Burlington*") to his version of the facts in this case. However, Petitioner has not set forth any dispute with *Burlington* in the Court of Appeals or with this Court, nor has he set forth any unsettled federal question. Rather, Petitioner simply argues that Tenth Circuit and

the District Court misapplied *Burlington* to the facts in this case. Simply put, Petitioner has wholly failed to carry his burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

This case arises out of the termination of Petitioner's employment by Respondent as part of the outsourcing of Respondent's Information Technology Department ("IT Department"), which included Petitioner, to IBM. Petitioner was employed by Respondent as a Senior Systems Analyst on Remedy and Tele Alert applications in Respondent's IT Department.

In 2004, Respondent made the decision to outsource most of its IT Department functions and employees to IBM. Respondent outsourced three hundred sixteen (316) employees out of five hundred fifteen (515) employees to IBM, more than sixty percent (60%) of the entire department. As part of the outsourcing, Respondent provided a list of affected employees in each department to IBM, as well as a list of Key Provider and Critical Support Personnel. The list of Key Provider and Critical Support Personnel employees included only nineteen (19) total employees in the IT Department in Tulsa and did not include any employees on Petitioner's level in his group. IBM conducted interviews of the employees in the IT Department and made hiring decisions based upon its interviews. Respondent had absolutely no input into this process.

On July 1, 2004, Petitioner's employment with Respondent was terminated as part of the outsourcing of the IT Department – and him – to IBM. Petitioner was offered Short Term Supplemental Employment by IBM, and he commenced employment with IBM on July 1, 2004, thereby suffering no break in his continued employment. Petitioner received the same compensation with IBM that he had been receiving with Respondent and continued to provide support for the Remedy application. On August 10, 2004, Petitioner was offered Long Term Supplemental Employment with IBM. Petitioner's employment with IBM was terminated in March 2005, and, in connection with the termination, Petitioner was provided a substantial severance package from IBM and signed a form releasing IBM from any claims.

In this case, Petitioner alleged that he was "forced" to cross-train on different applications, which he claims resulted in him not being hired as a permanent employee by IBM. However, the cross-training on different applications was required by Petitioner's supervisor for all employees who reported to her as a benefit to both the employees and Respondent, and it seems axiomatic for Petitioner to argue that the cross-training somehow constituted discrimination against him.

Cross-training was required by Petitioner's supervisor in order to enable all of the employees reporting to her, including Petitioner, to become more familiar with multiple applications, thereby ***increasing*** their value in the event of an outsourcing. The cross-training effort was initiated in order to permit employees to gain additional skills as well as to fill a need for backup

support on certain applications and to ensure that more than one employee supported each application.

To ensure cross-training and backup on all applications, Petitioner's supervisor utilized an Internal Systems Cross Training Worksheet, which listed the different applications that employees in the IT Department supported and provided a primary analyst and at least one secondary analyst for each application. The assignment of a person as primary or secondary had nothing to do with seniority or who was the lead, but related only to who would be the first to be called by a client. The primary assignment was used by Petitioner's supervisor to increase the workload for individuals newly assigned to an application to provide them a sufficient volume of projects to be trained.

Most employees were trained in numerous applications, and most applications had more than one employee trained. However, Petitioner was Respondent's only employee who had been trained as an analyst on Remedy and Tele Alert, and he was adamant about remaining the sole individual on these applications. Petitioner's supervisor gave each employee the option to select the applications on which they would cross-train, but, of all the employees, Petitioner was the only employee who refused to voluntarily select a new application to learn. Petitioner's supervisor assigned another employee as primary analyst to work on projects on Remedy and Tele Alert along with Petitioner in order for her to cross-train and gain additional knowledge of the Remedy and Tele Alert applications. Furthermore, because Petitioner absolutely refused to voluntarily select a new application to learn, Petitioner's supervisor

directed him to train on the PVCS Tracker application in order to increase his skill set.

On April 27, 2004, Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging race and national origin discrimination based upon his transfer from primary to secondary analyst on Remedy and being "forced" to cross-train. In this case, Petitioner alleges discrimination and retaliation on the basis of his race and national origin because he did not receive a promotion and was forced to cross-train on different applications.

Petitioner also alleges in this case, in a somewhat bizarre fashion, that he was the victim of some type of racial harassment while he was employed by Respondent. Petitioner alleged that he was the victim of harassment because, among other seemingly benign acts, his supervisor gave him a small gift (which he cannot remember) and a plastic bag of McDonald toys for his five (5) children and attempted to teach him "Oklahoma slang," a coworker gave him a "full" water bottle, someone placed under his chair a box of "old stuff" that belonged to a former deceased colleague, and he received a forwarded email with a story about Eddie Murphy and Michael Jordan (which did not portray African Americans in a negative light, but actually highlighted the problems associated with racial stereotypes). It has been unclear throughout this case whether Petitioner has brought a hostile work environment harassment claim under Title VII, or whether he has only offered such odd diatribes as "evidence" of pretext for discrimination. Regardless, the Tenth Circuit and the District Court held that Petitioner

has not established that he was subjected to a hostile work environment during his employment with Respondent.

On December 4, 2006, the District Court entered its Opinion and Order, dismissing Petitioner's claims of race and national origin discrimination, hostile work environment, and retaliation in violation of Title VII and Section 1981.[1] The District Court held that Petitioner failed to establish a *prima facie* case of discrimination based on Respondent's failure to promote him to a "Systems Analyst Staff grade level 22 or higher," as there is no evidence that the position to which Petitioner refers was open, that Respondent sought to promote any employee to that position, or that Petitioner applied to that position. (Pet. App. 35a). The District Court also held that Petitioner was not discriminated against based upon the cross-training on applications other than Remedy, as Respondent "clearly and logically viewed the training and proficiency in multiple applications as an asset, not a detriment" and Petitioner failed to show that he was treated any differently than other employees. (Pet. App. 39a). Regardless of whether Petitioner was able to establish a *prima facie* case of discrimination, the District Court also held that Respondent set forth a legitimate business reason for its cross-training in that Respondent's policy was "to ensure that more than one employee supported each application." (Pet. App. 41a). The District Court also held that Petitioner failed to

1. In his Appendix, Petitioner includes the opinions of the Tenth Circuit (Pet. App. 3a-11a) and the District Court (Pet. App. 12a-53a). In the opinions as provided in the Appendix, Petitioner has underlined and emphasized portions of the opinions that were not underlined or emphasized by the Tenth Circuit or the District Court.

provide any evidence sufficient to establish a retaliation or hostile work environment claim based upon his employment with Respondent. After the District Court dismissed Petitioner's claims, he then appealed to the Tenth Circuit. On August 9, 2007, the Tenth Circuit entered its Order and Judgment affirming the District Court's opinion.

REASONS FOR DENYING THE PETITION

The Petition should be denied because Petitioner has failed to carry his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. Instead, Petitioner simply argues that the District Court allegedly misapplied *Burlington* to his version of the facts.

In this case, Petitioner made the argument that his case should not be dismissed based upon the law as set forth by this Court in *Burlington*, but, when applying *Burlington* to the undisputed facts in this case, the District Court determined that Petitioner was unable to establish a *prima facie* case of retaliation and was unable to establish that Respondent's legitimate business reasons for "forcing" Petitioner to cross-train and/or failing to promote Petitioner were pretext for retaliation.

Petitioner appealed the District Court's opinion to the Tenth Circuit Court of Appeals, based again upon his interpretation of *Burlington*. The Tenth Circuit affirmed the District Court's opinion and held that Petitioner was unable to establish a claim of retaliation under either Title VII or Section 1981, based upon the law as set forth in *Burlington*.

Now, Petitioner has taken it one step further, and is requesting that this Court review the District Court's factual findings and the application of *Burlington* by the Tenth Circuit and the District Court to the facts in this case. Petitioner appears to argue that this Court should grant his Petition to determine whether the standard for a *prima facie* case of retaliation under Title VII as set forth by *Burlington* is the same for a claim under Section 1981. The question presented by Petitioner fails, for a multitude of reasons, to provide any basis for the granting of his Petition.

First, the Tenth Circuit and the District Court determined that Petitioner was not subject to retaliation based upon *Burlington* in the Title VII context, so, even were this Court to grant the Petition and hold that the standard for retaliation set forth in *Burlington* applies to Section 1981, the outcome by the Tenth Circuit and the District Court would not change.

Second, and more importantly, this Court is currently in the process of deciding whether a race retaliation claim is even cognizable under Section 1981 in *CBOCS West, Inc. v. Hedrick G. Humphries*, No. 06-1431. Obviously, if it is decided that there is no retaliation claim under Section 1981, then Petitioner's questions presented in this case with respect to the standard for a retaliation claim based upon Section 1981 become absolutely irrelevant. Further, even if it is decided that there is a retaliation claim under Section 1981, the appropriate standard – whether or not it is based upon *Burlington* – will then be set forth by this Court in that opinion.

As Petitioner has not presented any compelling reasons for this Court to grant his Petition, but has only argued that the Tenth Circuit and District Court misapplied *Burlington* to the facts in this case, the Petition should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

J. PATRICK CREMIN
Counsel of Record
MOLLY BIRCHER
HALL, ESTILL
320 South Boston Avenue
Suite 200
Tulsa, Oklahoma 74103
(918) 594-0400

Attorneys for Respondent